No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE, JOE SEEPLE AND HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD AND MARY S. HAYWARD,

Appellees.

Reply Brief of Appellants Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn.

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ARGUMENT.

The Assignee of the Interests of the Treasure Company, To-wit: The Reconstruction Finance Corporation, Is the Only One of Our Opponents Who Claim That Judge Westover Is Not in Error in Dividing the Jury Award into 100 Parts Instead of 80.6 Parts Even Though the Award Was for the Working Interests only, and There Are Only 80.6 Working Interests.

The United States Government as condemner has filed no reply to our Opening Brief questioning the arithmetical error of Judge Westover.

As pointed out at Page 23 of our Opening Brief (Adamant, Scoville, Seeple and Wynn) the Treasure Company never owned but 26.1 working interests.

Hence the Reconstruction Finance Corporation received only 26.1 per cent working interests as assignee of Treasure Company.

The award of the jury of $194,500.00 for "total working interests," is divided into 100 parts by Judge Westover, hence each unit or 1 per cent is worth only $1945.00. This amount multiplied by 26.1 units or per cents amounts to $50,764.50 which is all that the Treasure Company or its belated assignee is entitled to receive.

And yet under paragraph X of the Conclusions of Law [R. p. 153], the Reconstruction Finance Corporation as assignee is given $97,767.00, which is $47,003.00 that they are not entitled to, as assignee of 26.1 units belonging to Treasure Company.

Query 1. Where did the excess of $47,003.00 come from?

Query 2. How can the trial court increase the holdings of Treasure Company from 26.1 units to 51 units, or 51 per cent?

The appellants, Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, respectfully submit that the Treasure Company never had more than 26.1 working interests or percents after it had accounted to the lessor for 19.4 per cent of production and after it had assigned the remaining production or portion of the leasehold to the Adamant Company, Scoville, Wynn, Bullen and Hayward, Johnson and Bodkin, *as shown on Page 23 of these appellants' Opening Brief.*

* * * * * * * * *

At pages 22 *et seq.* the R. F. C. attempt to construe the words: "total working interests in Treasure Well No. 8" to mean total leasehold estate.

A leasehold estate comprised working "interests *and landowner's interests,* and hence "total working interests" is not the entire leasehold estate.

Perhaps the R. F. C. can explain to the Court that when the Treasure Company never had more than 26.1 per cent working interests it suddenly jumped to 51 per cent working interests.

* * * * * * * * *

At Page 23 the R. F. C. states as follows:

> "If the word 'total' means anything when expressed in terms of arithmetic percentages, it means 100%."

Certainly it means 100 per cent but of what? "Total working interests" does not mean total interests in the venture *because it excludes the landowners' interests* which is part of the total leasehold but not a part of the total working interests.

* * * * * * * * *

At Page 27 of its Brief the R. F. C. states:

> "* * * and that the fund must be divided as though there were a verdict reading: 'For the entire leasehold estate of the Fletcher lease and the Burns No. 1 Lease—$194,500.00.' "

It is too bad that the R. F. C. did not prepare their jury verdict to read as they now want it.

The above suppositious verdict is certainly ideal but not realistic as it contradicts the words of the real verdict.

Appellants submit that there is a mathematical error in dividing the jury award into 100 parts and thereby giving the Treasure Company (R. F. C.) more than it owned.

The Reconstruction Finance Corporation in Its Second Capacity as Assignee of Treasure Company Is Our Only Opponent Who Claims We Do Not Have an Equitable Lien Upon the Funds of the Jury Award Belonging to the Treasure Company.

The Reconstruction Finance Corporation claims that Treasure Company did not act "inconscionably" in the operation of Treasure Well No. 8 before it was seized and condemned by the United States Government.

The record shows that Treasure Well produced from 160 to 200 barrels of oil per day besides many cubic feet of gas for the period of three years and nine months before the Government seized the property, and that the sale price of that production as stipulated in the case at bar was $205,411.69, and that these appellants who own and had established an interest of 47 per cent of total production were not paid one dime on their investment and ownership by Treasure Company and its president, the one person who really conducted all of the affairs of the Treasure Company.

(The above statement is subject to the fact that Mr. Wynn was paid a check for $88.54 in the spring of 1939 out of the well's production.)

We believe that if Treasure Company stood before this Court (instead of its assignee, the Reconstruction Finance Corporation) there would be inquiries from the Bench, wanting to know, "why didn't you, the Treasure Company, return a profit to these appellants on their 47 per cent interest on such a large production?" The fact that the record shows that the Treasure Company preferred to hire lawyers and contest the rights of these appellants, can indicate only an unfair, unconscionable and inequitable at-

titude on the part of Treasure Company toward these appellants and their right to a portion of the profits from this oil well.

We submit that since the Resconstruction Finance Corporation stands in the shoes of the Treasure Company they cannot expect, in equity and good conscience, to receive any moneys due the Treasure Company under the award.

It Is a Vain Attempt for the Reconstruction Finance Corporation in Its Brief to Claim That We Must Rely Upon an Accounting Action Pending in Another Department of This Federal Court in Order to Arrive at the Amount of Our Equitable Lien.

In its other dual capacity the Reconstruction Finance Corporation as plaintiff and condemner produced the following testimony by its main expert witness, Dr. Dodge:

> (Doctor Dodge.) "However, that became of no importance since the operating charges which we, I should say I—Mr. Sheldon and I, in making this appraisal, assumed to be the operating cost in the future, were below a $10.00 per cent per month, which created a difference, or at least one of the differences between these various classes of per cents. Our operating costs which we postulated in making our estimate of the future value of this property were very much less than $10.00 per month per cent, which was the breaking line between at least certain classes of these working interests of which you speak. * * * *and it is not governed or influenced by any possibly inflated idea of costs that might have been existing in the past.*" [Jury Trial, R. pp. 336-337.]

Dr. Dodge, Witness, testified further:

> "Q. By the way, we never did ask you the exact figure that you allowed for cost per well per year? A. $3,200 per operating well-year.
>
> Q. The same as Mr. Stoltz? A. The same as Mr. Stoltz." [Jury Trial, R. p. 815.]

It is apparent that Dr. Dodge referred to the "inflated idea of costs that might have been existing in the *past*" as those costs which the Treasure Company was attempting to impose on this well operation before the condemnation proceeding.

The appellants submit that the Reconstruction Finance Corporation in its capacity as assignee of Treasure Company is bound by the evidence it produced in its capacity as condemner, *and to hold otherwise would allow R. F. C. to assert the opposite sides of a contention in the same court action.*

* * * * * * * * *

At pages 19 and 20 in its Brief, the Reconstruction Finance Corporation quotes from *Florida Beaches et al., v. Niagra Investment Co., et al.,* (148 F. 2d 963, 1945).

Before quoting from said case, they state:

> "As before pointed out, the Adamant Company and Scoville, have already commenced an accounting action against Treasure Company, which is now at issue in another Court, but even if this action were not pending, we submit that this Court should question the propriety of a District Court adjudicating in its order of distribution disputes between claimants

to a condemnation award where the disputes are extraneous to the issue of determining those whose property interests have been seized and for which compensation is payable."

The facts before this Court are *different* from the facts in the *Florida Beaches* case *supra*. In that case the Circuit Court definitely ruled in favor of these appellants and contrary to the contention of the Reconstruction Finance Corporation.

The Court stated as follows:

"We do not doubt that in distributing the funds in a condemnation proceeding, *the District Court can recognize not only the legal title, but also the plain equities in the property condemned* but we think it is going too far for it to undertake specific performance of a contract and an adjustment of equities about *other* lands also, between corporations of the *same* state over whose controversy it *did not* have *original jurisdiction.* The most it ought to do would be to keep the funds safe, if that is shown to be necessary, until the parties can protect their rights in it elsewhere. * * *" (Emphasis added.)

Florida Beaches, etc. v. Niagara Inv. Co., et al., 148 F. 2d 963, 1945.

On May 31, 1949 (6 years and 8 months after this condemnation action was filed) the Reconstruction Finance Corporation and the Southern California Gas Company *took over* the *entire interests* of the Treasure Company in this oil well, and agreed to save the Treasure Company from all the claims of these appellants. We refer to said contract known as Adamants' Exhibit I, Judge Beaumont, Feb. 23, 1950.

The Reconstruction Finance Corporation, the Southern California Gas Company, the Treasure Company, the Samarkand Oil Company, the Empire Oil Co. and the Trust Oil Company (the last four companies signed by G. de Bretteville, President) entered into a contract on May 31, 1949, in which all of the *real* and *personal* property belonging to Treasure Company, which, of course, includes *Treasure Well* and *its equipment,* was transferred to the Reconstruction Finance Corporation with the distinct understanding that the Reconstruction Finance Corporation *would save said four companies,* of which de Bretteville was president, harmless from any claims of the Adamant Company, Walter B. Scoville and Harry Wynn and others.

We quote from the language of said contract:

> "It is further agreed that except as hereinbefore provided that the Reconstruction Finance Corporation and Gas Company will not look to the Trust Oil Company, *or any of the three companies,* for reimbursement for any damages which the Reconstruction Finance Corporation and the Gas Company may be called upon to pay in said condemnation action, to other parties to said action other than the three companies and Gus de Bretteville and Mrs. Gus de Bretteville."

(See original Adamant Exhibit I—Judge Beaumont Feb. 23, 1950.)

The above contract takes away from these appellants the real and personal property of Treasure Company and subrogates the Reconstruction Finance Corporation in place of the Treasure Company.

We submit in the case at bar that all the equities of these appellants, of Treasure Company and Reconstruction Finance Corporation, are involved in the case at bar, that the Reconstruction Finance Corporation has assumed the burden of the claims of these appellants, and that there are no "other lands" or "corporations" nor any similar situations as is ruled upon in the *Floridia Beaches* case. In fact the italicized portion of that decision shows that this Court has jurisdiction in the case at bar to declare our equitable liens.

* * *

At page 3 of the R. F. C. Brief it states:

> "The question, therefore, is: was Treasure Company, the original lessee, bound by the 'two for one' agreement?"

At page 5 of said Brief it stated that:

> "that the deposit of such funds into the 'Treasure Company Trust Fund' was in accordance with the agreement between Treasure Company, The Adamant Company and Scoville. [Adamant-Scoville-Wynn Ex. 'D', R. 202, 1272.]"

The above statement is incorrect as said contract of April 5, 1938, being Exhibit "D," did not require Mr. Scoville or the Adamant Company to pay any more than $10,000.00, the amount mentioned in the contract. That said amount was paid prior to the Bullen and Hayward $5,000.00 amount, and even Judge Vickers held that there was nothing in said contract requiring the Adamant Company and Scoville to raise any more money than the original $10,000.00. There is no doubt that the Bullen

and Hayward fund went for the benefit of the leasehold and, if any obligation was created, the Treasure Company and Mr. DeBretteville are the ones who failed to carry out the obligation.

* * *

At page 5 the R. F. C. in its Brief states that "On the contrary such testimony supports the conclusion that whereas the President of Treasure Company refuses to assume responsibility for the "two for one" agreement [R. 1208] the obligation was admitted by Scoville to be his responsibility [R. 1209]."

So far as Mr. Scoville is concerned there is no such admission, and the R. F. C. is simply quoting *testimony* of Mr. Hayward, which is hearsay and not binding upon Mr. Scoville.

* * *

At page 6 of the R. F. C. Brief there is a quotation of a letter written by Mr. Hayward containing the following statement, among others:

> "It is our contention now, and has been all the way through, that if Mr. Scoville guaranteed all of the money necessary to complete the well, then Mr. Scoville's royalties should be diverted from him to pay the debts which were incurred, and our small interest should come to us and not be used as they have been. * * *"

So far as Mr. Scoville is concerned, he made no such guarantee, and is not bound by Mr. Hayward's statement in his letter. Said statement is hearsay so far as Mr. Scoville is concerned.

* * *

At page 8 *et seq.*, the R. F. C. discussed the question of equitable lien and attempted to dismiss it by ridicule, in accuracies and empty logic.

* * *

At page 8 they state that:

> "The stipulation on gross proceeds was before the payment of landlord's royalties [R. 1236], stipulated to have been 19.4 per cent of the total production [R. 746]."

The above overlooks the fact that the 47 per cent royalty under the assignments covered 47 per cent of *total* production so it becomes immaterial that 19.4 per cent of total production went to the landlord.

* * *

At page 9 of its Brief the R. F. C. states:

> "No part of such gross proceeds handled by Treasure Company was owed to the Adamant Company, Scoville or Seeple for the period from December 8, 1938, to and including December 31, 1939 (for which there was an accounting) because of the express holding in paragraph II of the Vickers' Judgment [Adamant, Scoville, Wynn Ex. 'E,' R. 202, 1273]."

The above accounting action referred to, showed that thousands of dollars went into equipment out of these moneys due Adamant and Scoville and *this equipment was taken over by the Government in its condemnation action.*

* * *

At page 9 the R. F. C., under No. 3, states:

> "Any portion of such gross proceeds handled by Treasure Company from January 1, 1940, to the date of seizure, which may be owed to the Adamant Company, Scoville and other assigns, is subject to a surcharge for their respective *pro rata* shares in the completion, operating and maintenance costs and charges of Treasure Well because of the express holding in paragraph III of the Vickers' Judgment, *supra.*"

As before stated, the completion costs charged against Adamant and Scoville went into the *res* or equipment which was taken over by the Government.

The operating and maintenance costs was testified to *by the Government witnesses* as $3.30, a one per cent per month, in the case at bar.

* * *

At page 9 under designation 4 the R. F. C. states in its Brief:

> "That the completion, operating and maintenance costs and charges of Treasure Well to the date of its seizure are ascertainable and should not be arbitrarily estimated at $6,979.50 on the basis of testimony of experts in the evaluation trial, which testimony was addressed solely to prospective operating expense such as would have been incurred during the future economic life of the well without reference to costs and charges actually incurred prior to the date of seizure."

We are not surprised that the R. F. C. would attempt to disallow the testimony of *their own expert witnesses* after they have discovered that such testimony is binding upon them.

In fact, Dr. Dodge, their chief expert, stated in effect that his testimony was *"not* governed or influenced by any possibly inflated idea of costs that might have been existing in the past" [Jury trial, R. 336-337].

It is refreshing to note that the R. F. C. concedes at page 16 of its Brief the following:

> "Apparently this agreement contemplated a *joint ownership,* operation and control of several leasehold estates by the parties and the sharing of profits and loss therefrom, and it is possible that under its terms a 'joint adventure' was established. Be that as it may, this agreement is not before this Court for the reason that it was terminated under the express provisions of paragraph III of the Vickers' Judgment, *supra,* and the District Court so concluded [Concl. IV, R. 151-152] such rights as the Adamant Company and Scoville may have enjoyed in the joint operation and control of Treasure Well were lost to them as of January 31, 1939, under the express provisions of Paragraphs I and IV of the Vickers' Judgment, *supra,* and, accordingly, any reference in the Vickers' Findings of Fact to a 'joint adventure' was addressed to the relationship between the parties which existed prior to that date."

The above is an attempt to becloud the issue and make it appear that when the Vickers' Judgment took away from the Adamant Company and Scoville the "joint operation and control" of the well, they were thereby deprived of their rights of property in the *proceeds* of the "joint adventure." Such is not the case.

It must be pointed out that after the Vickers' Judgment the Adamant Company and Scoville were still entitled to their portion of the net earnings, which portion constitutes the basis of the equitable lien and they still held their royalty interests but simply lost joint control of the operation of the well.

* * *

At page 17 of its Brief the R. F. C. wonders if there was any fraudulent conduct on the part of Treasure Company toward the holders of royalty interests which would induce the Court of equity to impress an equitable lien on Treasure Company's share of the award.

We leave it to the Court if any person or persons who are entitled to 47 per cent of the gross production of an oil well which has produced $205,411.69 should receive their portion of said production, subject to operating expense, testified to by the Government witnesses.

I think the Court will decide there is fraud some where. Such earnings were not paid over to the lawful owners.

* * *

The R. F. C. at pages 18 and 19 of their Brief claim that these parties

> "seek equitable relief merely as alleged unpaid creditors and therefore bring to this Court a dispute which is entirely extraneous to the condemnation proceeding."

The claims of Adamant Company, Scoville and Wynn were pleaded in our Answer in the condemnation case. We proved that those claims were based upon our rights as "joint adventurers" and not mere creditors.

The attempt to change our status by the above quotation is entirely without logic or support in a court of equity.

Conclusion.

Point I.

The Adamant Company is entitled to 25/80.6 of the jury award of $194,500.00 being the sum of $60,328.75.

Walter B. Scoville is entitled to 16/80.6 of the jury award of $194,500.00, being the sum of $38,610.40.

Harry Wynn is entitled to 6/80.6 of the jury award of $194,500.00, being the sum of $14,478.90.

The above figures compensating them for their ownership of the respective stated percentages in the leasehold upon which Treasure Well No. 8 was drilled.

Point II.

The Adamant Company, Walter B. Scoville and Harry Wynn have an equitable lien against all sums of money to be allocated to the Treasure Company or its belated assignee, the Reconstruction Finance Corporation, to the extent of 47 per cent of $205,411.68, amounting to $96,-543.35, less the operating charge of $6,979.50 (which the Government witnesses testified was a sufficient operating charge), or a net equitable lien of $89,563.99.

Respectfully submitted,

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Attorney for Appellants, The Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn.